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No. 434

In the Supreme Court of the United States

OCTOBER TERM, 1957

SIDNEY W. WILSON, PETITIONER

v.

CIVIL AERONAUTICS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (Pet. 1a-3a) is reported in 244 F.2d 773. The findings and orders of the Civil Aeronautics Board (R. 32-37, 41-42) [1] are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 9, 1957. The petition for a writ of certiorari was filed on September 6, 1957, pursuant to an order of Mr. Justice Black extending the time for filing to

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[1] We use the designation "R." in referring to the Joint Appendix filed in the court of appeals.

September 7, 1957. The jurisdiction of this Court is invoked under 28 U.S.C.A. 1254(1).

QUESTION PRESENTED

Whether Section 609 of the Civil Aeronautics Act, which empowers the Civil Aeronautics Board to suspend a pilot's certificate "if the interest of the public so requires", authorizes the Board to suspend the certificate of an airline transport pilot, found to have violated the Civil Air Regulations, as a deterrent sanction against violation of these Regulations.

STATUTE INVOLVED

The relevant provisions of the Civil Aeronautics Act of 1938, 52 Stat. 973, as amended, 49 U.S.C. 401, *et. seq.*, are:

AMENDMENT, SUSPENSION, AND REVOCATION OF CERTIFICATES

Sec. 609. [49 U.S.C. 559] The Authority [Administrator] may, from time to time, reinspect any aircraft, aircraft engine, propeller, appliance, air navigation facility, or air agency, may reexamine any airman, and, after investigation, and upon notice and hearing, may alter, amend, modify, or [the Board may] suspend, in whole or in part, any type certificate, production certificate, airworthiness certificate, airman certificate, air carrier operating certificate, air navigation facility certificate, or air agency certificate if the interest of the public so requires, or [the Board] may revoke, in whole or in part, any such certificate for any cause which, at the time of revocation, would justify the Authority [Administrator] in refusing to issue to the holder of such certificate a like certificate. In cases of emergency, any such certificate may be suspended, in whole or in part, for a period not in excess of thirty

days, without regard to any requirement as to notice and hearing. The Authority shall immediately give notice of such suspension to the holder of such certificate and shall enter upon a hearing which shall be disposed of as speedily as possible. During the pendency of the proceeding the Authority may further suspend such certificate, in whole or in part, for an additional period not in excess of thirty days.

CIVIL PENALTIES

Safety and Postal Offenses

Sec. 901. [49 U.S.C. 621] (a) Any person who violates (1) any provision of titles V, VI, and VII of this Act, or any provision of subsection (a) (1) of section 11 of the Air Commerce Act of 1926, as amended, or (2) any rule or regulation issued by the Postmaster General under this Act, shall be subject to a civil penalty of not to exceed $1,000 for each such violation. Any such penalty may be compromised by the Authority [Administrator for violations of titles V and VI, Board for violations of title VII] or the Postmaster General, as the case may be. The amount of such penalty, when finally determined, or the amount agreed upon in compromise, may be deducted from any sums owing by the United States to the person charged.

* * * * * *

STATEMENT

Petitioner is an airline captain employed by National Airlines (R. 20). On July 6, 1954, he was pilot-in-command of a flight scheduled to land at Greater Pittsburgh Airport. Weather conditions were such that an instrument landing was required (R. 15). The plane was duly cleared for an instrument approach on Runway 28 (R. 8), and petitioner was advised that the ceiling

was 700 feet, whereas in fact it was less than 300 feet (R. 30). Petitioner descended to 400 feet, could not see the runway, and abandoned his approach (R. 19). When a landing approach is abandoned under instrument conditions, the aircraft is required to follow a preordained flight pattern (known as a "missed approach procedure") to avoid possible collision with other aircraft. The missed approach procedure for Runway 28 requires in substance that the aircraft be flown straight ahead (almost due west) in climbing flight to an altitude of 2500 feet to a specified radio beacon approximately six miles from the approach end of the runway (R. 24), and there to obtain further clearance or instructions. Instead of following this plan, petitioner flew straight ahead for only a mile and a half and then executed a 180° left turn. He then flew east until southeast of the airport, made a right turn, and proceeded south to yet another radio beacon, all with the intention of approaching Runway 32 where landing is permitted at lower weather ceilings than on Runway 28 (R. 10, 19, 24, 33). For some two minutes after the missed approach petitioner did not respond to tower radio calls (R. 14, 15, 18, 35). After two approaches to Runway 32 by the copilot, petitioner took over and landed the plane on the third approach.

Petitioner's deviation from the missed approach procedure and his failure to maintain an appropriate radio watch were charged before the Board in a complaint by the Administrator of Civil Aeronautics under Section 609 of the Act (*supra*, pp. 2-3) as violations of the applicable Civil Air Regulations, as careless and reckless operation, and as a failure to exercise the degree of care, caution and judgment required of the holder of

an airline transport pilot rating (R. 3, 4).[2] The Administrator's complaint requested that "in the public interest, the Airline Transport Pilot Rating of [petitioner] be suspended" (R. 4).

Full proceedings followed before the Board. The examiner found the violations as charged (R. 20, 21), but concluded that no sanction should be imposed. The Board initially affirmed the examiner's decision (R. 31). On reconsideration (R. 32), the Board found itself in agreement with the Administrator's view "of the importance of imposing a suspension as a deterrent sanction in connection with our joint [Board and Administrator] responsibility for attaining the highest degree of safety in air transportation." Noting that the public interest requires an effective enforcement program, the fact that the violations were serious, and that it "is especially necessary under the current congested traffic conditions to adhere to prescribed air traffic rules and to maintain a proper radio watch," it concluded that a ten-day suspension should be imposed as a deterrent sanction in the interest of the public (R. 36, 37). The Board made no finding of incompetency or lack of flying ability on petitioner's part, and none was charged in the Administrator's complaint.

The order was challenged in the Court of Appeals on the sole ground of statutory authority. Petitioner's

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[2] The Administrator of Civil Aeronautics (Civil Aeronautics Administration) is charged with responsibility for the "policing" of the airways, and for the filing and prosecuting of complaints before the Board seeking suspension and revocation of airman certificates. See *Lee, Administrator of Civil Aeronautics* v. *Civil Aeronautics Board*, 96 App. D.C. 299, 225 F. 2d 950. An airline transport pilot rating is the type of certificate required of a pilot-in-command of a scheduled airline flight.

position was that suspension may be imposed only where there is a finding of incompetency or other lack of qualification to fly by the pilot and only until such time as that disability is removed, and that the only sanction applicable to other cases of violation is the imposition of the statutory monetary "penalties" prescribed in Section 901 of the Act (*supra*, p. 3).[3]

The court held to the contrary. It said (Pet. 2a):

> By resting suspension on a Board determination that "the interest of the public so requires", Congress conferred broad discretionary authority upon the Board. What Congress had in mind appears from the directive contained in § 601(b) of the Act that the Act be administered "in such manner as will best tend to reduce or eliminate the possibility of, or recurrence of, accidents in air transportation . . .". Nothing in the Act or its legislative history persuades us that disciplinary action for violation of regulations was intended to be the exclusive province of § 901.

The court further pointed out that the Board in its administration of the Act had imposed some 4000 suspensions for violations of the traffic rules without making findings of incompetency on the part of the pilot, and held that this consistent administrative practice should not be overturned except for very cogent reasons. The court concluded that (Pet. 3a) "[t]he most cogent of reasons—air safety—supports the administrative prac-

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[3] The function of assessing and compromising civil penalties for violation of the traffic rules is also that of the Administrator, conferred upon him by Reorganization Plans III and IV of 1940 (54 Stat. 1231, 1234). There are no criminal penalties provided for violations of the regulations here involved.

tice here under attack," and accordingly affirmed the Board's order.

ARGUMENT

Section 609 (*supra*, pp. 2-3) authorizes the Board to suspend a pilot's certificate "if the interest of the public so requires". As the court below said (Pet. 2a), Congress vested in the Board "broad discretionary authority" in applying this statutory standard. Compliance with the duly established Civil Air Regulations, including those dealing with instrument landings at airfields, is essential if the objective of these Regulations, safeguarding air travel, is to be achieved. A limited-period suspension of the certificate of a pilot who has disobeyed the Regulations is an important deterrent against noncompliance with the Regulations, and hence is in "the interest of the public". The deterrent sanction which the Board here imposed therefore comes within the express language of Section 609. In addition, the Board's application of the section is supported, if not indeed commanded, by provisions of the Act which require it to be administered so as to secure the fullest possible degree of safety in air travel.

The Act provides that when the Board issues the certificates authorized by Title VI, it shall give full consideration to the duty resting upon air carriers to perform their services "with the highest possible degree of safety in the public interest" (Sec. 601(b), 49 U.S.C. 551). It also directs the Board to exercise its powers in such a manner as will best tend to "reduce or eliminate the possibility of, or recurrence of, accidents in air transportation" *(ibid.)*. And the Act's declaration of policy defines "the public interest" as including, regulation of air transportation in such manner as to

"assure the highest degree of safety" in such transportation, and regulation of air commerce in such a manner "as to best promote its development and safety" (Sec. 2, 49 U.S.C. 402).

In the present case the Board took cognizance of the foregoing considerations. It declared in its opinion on reconsideration that "we are persuaded by the Administrator's view of the importance of imposing a suspension as a deterrent sanction in connection with our joint responsibility for attaining the highest degree of safety in air transportation" (R. 36). It said further: "The public interest in maintaining an effective enforcement program is manifest; if our safety regulations are not observed they make little contribution to the high degree of air safety in air transportation which we are charged with attaining" *(ibid.)*.

The fact that Section 901 of the Act (*supra*, p. 3) provides a civil penalty not to exceed $1,000 for violation of the provisions of Titles V, VI, and VII of the Act does not, by implication, restrict or limit the Board's power under Section 609 to suspend a pilot's certificate for violation of the Civil Air Regulations, as a deterrent sanction against like violations by the offending pilot or by others. Congress may, and frequently does, provide more than one remedy against conduct declared to be unlawful. *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 694-695; *Helvering* v. *Mitchell*, 303 U.S. 391, 399. But if there were any possible doubt as to whether, under the statute, disciplinary action for violation of regulations (established to secure safety in air travel) is the "exclusive province" of Section 901, the contrary is established by long-continued and consistent administrative construction of the Act.

Seldom, if ever, has there been a more conclusive showing of such administrative construction. Petitioner has not challenged the statement by the court below (Pet. 2a-3a) that from the effective date of the Act in 1938 through June 30, 1956, the Board has suspended approximately 4,000 airmen for rules' violation, without finding lack of competence and without requiring re-examination before reinstatement, in other words, suspensions imposed as deterrent sanctions. "[A]dministrative practice, consistent and generally unchallenged, will not be overturned except for very cogent reasons", and such practice "has peculiar weight when it involves a contemporaneous construction of the statute by the men charged with the responsibility of setting its machinery in motion." *Norwegian Nitrogen Co.* v. *United States,* 288 U.S. 294, 315.

There was the same practice under like statutory provisions of the predecessor statute, the Air Commerce Act of 1926 (44 Stat. 568). Section 3(f) of that Act authorized the Secretary of Commerce to provide "by regulation" for the "suspension and revocation" of airman certificates (44 Stat. 569-570). Under subdivisions (a)(5) and (b) of Section 11 of the Act (44 Stat. 574), navigation of an aircraft otherwise than in conformity with the air traffic rules subjected a person to a civil penalty of $500, to be collected by proceedings in personam against the person subject to the penalty. Thus Sections 3(f) and 11 directly corresponded, respectively, with Sections 609 and 901 of the successor statute. In addition, legislative history establishes that Congress intended that the Civil Aeronautics Act of 1938 should follow and carry forward the provisions and methods for safety regulation of the earlier stat-

ute.[4] Since the Secretary of Commerce had administered the Air Commerce Act of 1926 upon the basis that its suspension and civil-penalty provisions constituted alternate sanctions, and had so reported to Congress,[5] this construction of "the law from which the challenged statute emerged" is entitled to great weight. *United States* v. *C.I.O.*, 335 U.S. 106, 112.

Petitioner urges that Section 609 permits suspension solely by way of remedial relief. Although petitioner does not squarely face the question necessarily raised by this contention, namely, the circumstances under which a suspension would be purely remedial, he implies (Pet. 2) that suspension is permissible only if the person concerned is "unqualified to hold" a certificate as an airline transport pilot. But this is the very standard provided in Section 609 (*supra*, p. 2) for *revocation* of a pilot's certificate, namely, "any cause which, at the time of revocation, would justify the Authority [Administrator] in refusing to issue to the holder of such certificate a like certificate." The contrast between this standard, lack of qualification to hold a pilot's certificate, and the broad and flexible standard for suspension, "if the interest of the public so requires", conclusively establishes, we submit, the groundlessness of petitioner's contention as to the limited scope of the suspensions authorized by Section 609.

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[4] For example, the report of the House Interstate and Foreign Commerce Committee on H.R. 9738 (75th Cong., 3d Sess.), the companion bill of S. 3845 which became the Civil Aeronautics Act, states: "The existing methods of safety regulation are permitted to remain virtually as they are under existing law" (H. Rep. 2254, 75th Cong., 3d Sess., p. 2).

[5] Reports of the Secretary of Commerce: Sixteenth Annual Report, 28; Seventeenth Annual Report, 19; Eighteenth Annual Report, 14; Nineteenth Annual Report, 12; Twentieth Annual Report, 10.

The different statutory standards for suspensions and for revocations also make inapposite petitioner's reliance (Pet. 8-11) on what he terms "analogous statutes as aids in construction". We additionally suggest that no presently relevant conclusion can be drawn from these "analogous statutes".

Suspension for a ten-day period of an airline transport pilot's certificate upon findings, such as made here, that he had violated Civil Air Regulations under circumstances "endangering lives and property" (R. 23), is, as previously stated, squarely within the language of the applicable statutory provision, and is also in furtherance of a principal statutory objective, promotion of safety in air travel. Furthermore, Congress lawfully may sanction the enforcement of statutory obligations by providing reasonable civil penalties and conferring upon administrative officials power to impose such penalties. *Lloyd Sabaudo Societa* v. *Elting*, 287 U.S. 329, 334.

Petitioner relies upon the Board's ruling in *Brubaker and Olsen*, C.A.B. Docket Nos. S.R.-2168, S.R.-2169 (Pet. 13).[6] The proceeding involved the application of Section 1004(i) of the Civil Aeronautics Act, 49 U.S.C. 644(i), which provides that no individual shall be subjected to a "penalty or forfeiture" on account of any matter concerning which he has been compelled to testify after a claim of privilege against self-incrimination. The Board stated that suspensions imposed to "deter further violations by the offending pilot

[6] A proceeding by the Administrator of the Civil Aeronautics Board seeking review of this ruling was dismissed upon the ground that the Administrator did not have a "substantial interest" in the Board's order and therefore lacked standing to petition for review. *Lee* v. *Civil Aeronautics Board*, 225 F. 2d 950 (C.A.D.C.).

and by others" are "remedial in the sense that they are designed to promote safety", but also are "disciplinary in character", and for this reason constitute a type of civil "penalty" for which Section 1004(i) provides immunity.

The premise of the *Brubaker and Olsen* ruling, that Section 609 authorizes suspensions imposed as deterrent sanctions, is directly contrary to petitioner's contention here. The validity of this application of the section is not affected by the fact that the section may not be enforced against one who has claimed and been granted the privilege against self-incrimination. Forfeitures and other civil sanctions of severity are not "essentially criminal", and are not rendered such by the fact that they may support a claim for the constitutional guaranty against compulsory self-incrimination. *Helvering* v. *Mitchell*, 303 U.S. 391, 400.

CONCLUSION

The decision below is correct and there is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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OCTOBER, 1957.

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